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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN VANGINDEREN,
Plaintiff,

v.

CORNELL UNIVERSITY,
Defendant.

Case No. 07-CV-2045-BTM-JMA

Hon. Barry T. Moskowitz

DECLARATION OF NELSON E.
ROTH IN SUPPORT OF
CORNELL'S SUPPLEMENTAL
REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
SPECIAL MOTION TO STRIKE
PLAINTIFF'S COMPLAINT
PURSUANT TO SECTION 425.16
OF THE CALIFORNIA CODE OF
CIVIL PROCEDURE

[Per chambers, no oral argument
unless requested by the Court]

Hearing Date: December 21, 2007

Time: 11:00 a.m.

Place: Courtroom 15

Action Filed: October 1, 2007

DECLARATION OF NELSON E. ROTH IN SUPPORT OF SUPPLEMENTAL
REQUEST FOR JUDICIAL NOTICE

DECLARATION OF NELSON E. ROTH

I, Nelson E. Roth, declare as follows:

1. I am an attorney admitted to practice in California and the United States District Court for the Southern District of California, as well as before the courts of the State of New York, among others, and I serve as Deputy University Counsel at Cornell University. I am also thoroughly familiar with New York criminal law and procedure, having taught criminal law at the Cornell Law School for approximately 10 years and having served as a New York State Special Prosecutor and Deputy Attorney General from 1993 to 1997. Except as otherwise noted, I have personal knowledge of the facts set forth herein.

2. I submit this Declaration in reply to Plaintiff's opposition papers and in further support of the Defendant's Request for Judicial Notice in Support of Special Motion to Strike ("Request for Judicial Notice"). If called as a witness, I could and would testify competently to the following.

3. With respect to criminal charges brought against Plaintiff in the City Court of the City of Ithaca, New York, in 1983, Plaintiff states at paragraph 6 of his November 20, 2007 affidavit that "the entire record was sealed" in 1985. This is erroneous. While my September 19, 2007 e-mail to Plaintiff, attached as Exhibit 5 to Plaintiff's opposition papers, did indicate my belief that Plaintiff's criminal records were sealed, I subsequently learned from the Ithaca City Court that records of the proceedings before the Ithaca City Court relating to Plaintiff were, in fact, never sealed. My prior belief that the records were sealed was based on the fact that the records of the Cornell University Police were marked sealed. Only after Plaintiff refused to consent to unseal his criminal records and Cornell was required to submit an application to Ithaca City Court seeking to unseal the records did I learn that there were proceedings involving Plaintiff in two courts, that the proceedings in Ithaca City Court were not sealed, and that the proceedings before a Tompkins County Grand Jury and the Tompkins County Court, including the

1 investigative file of the Cornell University Police and the prosecution file of the
2 Tompkins County District Attorney, were sealed pursuant to a Seal Order entered by
3 the Tompkins County Court on March 5, 1985.

4 4. Cornell University obtained the records of the Ithaca City Court
5 (previously filed as Exhibit A to the Request for Judicial Notice) directly from the
6 Ithaca City Court on October 16, 2007 after that court determined that its records
7 were not sealed.

8 5. Contemporaneously with the filing of this Declaration, Cornell
9 University is filing a Supplemental Request for Judicial Notice with pertinent
10 documents unsealed pursuant to a November 16, 2007 order of the Tompkins
11 County Court granting Cornell's application to unseal records. A true and correct
12 copy of that unsealing order is attached to the Supplemental Request for Judicial
13 Notice as Exhibit E .

14 6. True and correct copies of pertinent records unsealed on November 16,
15 2007 are attached collectively to the Request for Judicial Notice as Exhibit F.

16 7. The now-unsealed records, and those previously filed by Cornell in this
17 matter, reflect the following chronology of events:

18 March 5, 1983 – While investigating reported thefts in Fernow Hall on
19 the Cornell University campus, Cornell Police obtained the student
20 identification number of a student who sold some of the stolen books to
21 a local bookstore, matched that student identification number to a
22 Cornell student named Kevin Vanginderen, and verified identification
23 with a book store clerk using a photo array. Supp. Req. Jud. Not., Ex.
F, pp. 5-24.

24 March 8, 1983 – Plaintiff confessed under oath to multiple burglaries
25 and larcenies that spanned a period of approximately one year prior to
26 Plaintiff's arrest. Multiple items of stolen property were recovered
27 from Plaintiff's residence. Plaintiff was charged the same date in
28 Ithaca City Court with Burglary 3rd Degree, a felony. Supp. Req. Jud.
Not., Ex. F, pp. 25-26 & 29-36.

1 June 7, 1983 – Tompkins County Grand Jury indicted Plaintiff for two
2 counts of Burglary in the 2nd Degree. Supp. Req. Jud. Not., Ex. F, p.
3 69.

4 August 1, 1983 – Tompkins County Court dismissed indictment “as
5 defective” and gave The People permission to refile. Apparently the
6 indictment mistakenly charged Burglary in the 2nd Degree instead of
7 the proper charge of Burglary in the 3rd Degree. See Supp. Req. Jud.
8 Not., Ex. F, pp. 90 & 92-93.

9 August 16, 1983 – Plaintiff’s attorney confirmed a negotiated plea
10 whereby the District Attorney agreed not to refile felony charge and to
11 accept a plea to petit larceny in full satisfaction of any charges relative
12 to the thefts at Cornell University. The People consented to a sentence
13 of a one-year conditional discharge. As part of the disposition, Plaintiff
14 returned all stolen property still in his possession. Req. Jud. Not., Ex.
15 A, p.6.

16 August 17, 1983 – An Accusatory Instrument was signed charging
17 Plaintiff with Petit Larceny, a Class A Misdemeanor. Req. Jud. Not.,
18 Ex. A, p. 7.

19 August 22, 1983 – The record of disposition in the Ithaca City Court
20 reflects that Plaintiff pled guilty to the charge in satisfaction of the
21 charge of Burglary 3rd Degree. Req. Jud. Not., Ex. A, p. 8.

22 March 5, 1985 – Tompkins County Court issued an order sealing
23 records of the Cornell Police, the District Attorney, the New York State
24 Division of Criminal Justice Services, the Tompkins County Sheriff,
25 and the FBI relating to the June 7, 1983 indictment charging Burglary
26 in the 2nd Degree (Tompkins County Indictment No. 83-46). The order
27 did not seal the records of the Ithaca City Court regarding the
28 proceedings that occurred in that court (including the original charge of
Burglary in the 3rd Degree) and the cover letter from the Office of
Supreme and County Court Clerks that accompanied the seal order
explicitly crossed out the reference to the Ithaca City Court from the
list of addressees. Supp. Req. Jud. Not., Ex. F, pp. 94-95.

October 16, 2007 – Ithaca City Court released copies of the records of
the proceedings before that court to Cornell University. Those records

1 were never sealed. Req. Jud. Not., Ex. A; Decl. of Valerie Cross Dorn
2 ¶ 5.

3 November 16, 2007 – The Tompkins County Court ordered the
4 unsealing of the records of the Cornell University Police and the
5 Tompkins County District Attorney pertaining to the proceedings held
6 in that court. Supp. Req. Jud. Not., Ex. E, pp. 3-4.

7 8. Thus the records show that, because the felony charges brought in
8 Tompkins County Court were dismissed, the records from that court were sealed.
9 However, the seal order did not purport to seal the records of the proceedings held in
10 the Ithaca City Court, either those before Plaintiff's indictment on felony charges, or
11 those relating to his subsequent negotiated guilty plea to a Class A Misdemeanor.
12 They further show that Plaintiff stands convicted in the State of New York of the
13 crime of petit larceny based upon the plea of guilty he entered to satisfy the charge
14 of Burglary in the 3rd Degree. The records reflecting the original charge of Burglary
15 in the 3rd Degree and his conviction of petit larceny are public records and, on
16 information and belief, have never been sealed.

17 I declare under penalty of perjury under the laws of the State of New York,
18 California, and the United States of America that the foregoing is true and correct
19 and that this declaration was executed this 12th day of December, 2007, at Ithaca,
20 New York.

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22 Nelson E. Roth
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